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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

TYREECE REYNOLDS,
Petitioner,
v.
A. HEDGPETH, Warden,
Respondent.

) Case No. EDCV 08-00905 VAP (AN)
)
) **MEMORANDUM AND ORDER**
) **DISMISSING HABEAS PETITION**
) **AS TIME-BARRED**
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Before the Court is a petition for a writ of habeas corpus (“Petition”) brought pursuant to 28 U.S.C. § 2254 by Tyreece Reynolds (“Petitioner”), a state prisoner proceeding *pro se*. For the reasons discussed below, the Petition is dismissed with prejudice because the Court finds it is time-barred.

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I. BACKGROUND

The Petition raises four claims for relief, all of which are directed at Petitioner's underlying convictions that he sustained following a jury trial in the San Bernardino County Superior Court (No. FSB042486) on December 16, 2004. (Pet. 2.)

The Petition and relevant state court records attached as exhibits show Petitioner appealed his judgment of conviction to the California Court of Appeal (No. E037520); on December 14, 2005, the intermediate state appellate court affirmed the judgment of conviction. (Pet. 3, attachments.) On January 19, 2006, Petitioner filed a petition for review with the California Supreme Court (No. S140505) that was summarily denied on February 22, 2006. (*Id.*)

Thereafter, Petitioner sought state collateral review of his underlying judgment of conviction. On May 17, 2007, Petitioner signed and constructively^{1/} filed a habeas petition with the San Bernardino County Superior Court (No. SWHSS700067) that was denied on June 13, 2007. (Pet. 4, attachments.) On December 30, 2007, Petitioner constructively filed his second state habeas petition with the California Court of Appeal that was denied on January 14, 2008. (Pet. 4, attachments.) Finally, on April 9, 2008, Petitioner constructively filed a habeas petition with the California Supreme Court (No. S162659) that is still pending before that court. (*Id.*)

On June 26, 2008, Petitioner constructively filed the pending Petition. (Pet. 8.) Pursuant to the Court's duty to screen § 2254 petitions, the Magistrate Judge found the

^{1/} Pursuant to the "mailbox rule," a *pro se* prisoner's habeas petition is deemed to be filed on the date the prisoner delivers the petition to prison authorities for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The mailbox rule also applies to *pro se* state habeas petitions. *Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003). The petition presented to the San Bernardino Superior Court was filed by the clerk on May 21, 2007, however, for purpose of the timeliness analysis, the Court gives Petitioner the benefit of the doubt by assuming he constructively filed the petition on the date he signed it, May 17, 2007. (Pet. 4, attachments.)

1 face of the Petition and accompanying relevant state court records plainly disclosed
2 that this action was barred by the one-year statute of limitations of the Anti-Terrorism
3 and Effective Death Penalty Act of 1996 (“AEDPA”). 28 U.S.C. §2244(d)(1)(A).
4 Accordingly, on July 23, 2008, the Magistrate Judge issued an order to show cause that
5 notified Petitioner the action appeared to be time-barred absent some other basis for
6 tolling or an alternative start to AEDPA’s one-year limitation period under 28 U.S.C.
7 § 2244(d)(1)(B)-(D). (*See* July 23, 2008, Order to Show Cause Re Dismissal of
8 Habeas Petition As Time-barred (“OSC”)). The OSC discussed various bases for
9 tolling and directed Petitioner to show cause why the action was not time-barred by
10 filing a written response no later than August 12, 2008. (OSC 2-9.) The OSC warned
11 Petitioner that his failure to file a timely response to the OSC would result in a waiver
12 of his right to respond to the OSC, and that his Petition would be dismissed with
13 prejudice as time-barred without further notice. (OSC 9:17-22.)

14 On August 15, 2008, Petitioner filed a motion for an extension of time to file a
15 response to the OSC (“Motion”). On August 19, 2008, the Court granted the Motion.
16 (*See* Aug. 19, 2008, Minute Order, Docket No. 7.) Petitioner was given fourteen (14)
17 days from the date of the 8/19/08 Order to file a response to the OSC. (*Id.*) On
18 September 1, 2008, Petitioner constructively filed his response to the OSC (“OSC
19 Response”). The matter now stands submitted.

21 II. DISCUSSION

22 A. Standard of Review

23 Rule 4 of the Rules Governing Section 2254 Cases in the United States District
24 Courts, 28 U.S.C. foll. § 2254, states that “the judge to whom [the petition] is
25 assigned” is required to examine the petition promptly and “[i]f it plainly appears from
26 the face of the petition and any exhibits annexed to it that the petitioner is not entitled
27 to relief in the district court, the judge shall make an order for its summary dismissal
28 and cause the petitioner to be notified.” Local Rule 72-3.2 of this Court also provides

1 “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus,
2 and if it plainly appears from the face of the petition and any exhibits annexed to it that
3 the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed
4 order for summary dismissal and submit it and a proposed judgment to the District
5 Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed
6 *sua sponte*, however, the district court must give the petitioner adequate notice and an
7 opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10,
8 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

9 **B. Statute of Limitations**

10 The Petition is governed by AEDPA, which establishes a one-year statute of
11 limitations for state prisoners to file a habeas petition in federal court, because the
12 Petition was filed after April 24, 1996, AEDPA’s enactment date. 28 U.S.C. §
13 2244(d)(1); *See Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In
14 most cases, the limitation period begins to run from “the date on which the judgment
15 became final by conclusion of direct review or the expiration of the time for seeking
16 such review.” 28 U.S.C. § 2244(d)(1)(A).

17 As discussed above, on February 22, 2006, the California Supreme Court denied
18 Petitioner’s petition for review. Petitioner never filed a petition for a writ of certiorari
19 with the United States Supreme Court. (Pet. 3, attachments.) Therefore, for purposes
20 of AEDPA’s limitation period, Petitioner’s judgment became final on May 23, 2006,
21 the ninetieth day after the state high court denied his petition for review and the date
22 his time to file a petition for a writ of certiorari with the Supreme Court expired.
23 *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The limitation period then started
24 to run the next day, May 24, 2006, and ended a year later on May 23, 2007. 28 U.S.C.
25 § 2244(d)(1)(A); *see also Patterson v. Stewart*, 251 F.3d 1243, 1245-47 (9th Cir. 2001)
26 (the limitations period begins to run on the day after the triggering event pursuant to
27 Fed. R. Civ. P. 6(a)).

28 Petitioner missed the deadline because he did not constructively file the pending

1 Petition until June 26, 2008 -- 400 days after the statute expired. Therefore, the
2 pending Petition is time-barred unless Petitioner is entitled to some form of tolling or
3 an alternate start date to AEDPA's statute of limitations period under 28 U.S.C. §
4 2244(d)(1).

5 **C. Statutory Tolling**

6 AEDPA provides a statutory tolling provision that suspends the limitation period
7 during the time a "properly-filed" application for post-conviction or other collateral
8 review is "pending" in state court. 28 U.S.C. § 2244(d)(2); *Bonner v. Carey*, 425 F.3d
9 1145, 1148 (9th Cir. 2005). An application is "pending" until it has achieved final
10 resolution through the state's post-conviction procedures. *Carey v. Saffold*, 536 U.S.
11 214, 220, 122 S. Ct. 2134 (2002). The limitation period is not tolled between the time
12 a final decision is issued on direct state appeal and the time a state collateral challenge
13 is filed because there is no case "pending" during that interval. *Thorson v. Palmer*, 479
14 F.3d 643, 646 (9th Cir. 2007); *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).
15 On collateral review, however, "intervals between a lower court decision and a filing
16 of a new petition in a higher court," when reasonable, fall "within the scope of the
17 statutory word 'pending'" thus tolling the limitations period. *Saffold*, 536 U.S. at 221,
18 223; *Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846 (2006) (*citing Saffold*).

19 On May 17, 2007 -- 358 days after the one-year limitation period started to run --
20 Petitioner constructively filed his first state habeas petition with the San Bernardino
21 County Superior Court and, on June 13, 2007, the petition was denied, leaving 7 days
22 remaining before the limitation period expired. (Pet. 4, attachments.) Under AEDPA,
23 Petitioner is not entitled to statutory tolling for this 358-day period because there was
24 no case "pending" during this interval. *See Thorson*, 479 F.3d at 646; *Nino*, 183 F.3d
25 at 1006.

26 Petitioner is entitled to statutory tolling from May 17, 2007, to June 13, 2007,
27 the 27-day period during which his first state habeas petition was pending in the trial
28 court. 28 U.S.C. § 2244(d)(2); *Bonner*, 425 F.3d at 1148. Statutory tolling for this

1 time extended the limitation period from May 23, 2007, to June 19, 2007.

2 Petitioner then waited until December 30, 2007-- another 200 days after the first
3 state habeas petition was denied on June 13, 2007 -- to constructively file his second
4 state habeas petition with the court of appeal. (Pet. 4, attachments.)

5 In *Evans*, the United States Supreme Court held that, in the absence of a clear
6 direction or explanation from the California Supreme Court as to what constitutes a
7 “reasonable time” (or the legislative enactment of a determinate time limit), federal
8 courts must conduct a case-by-case determination of whether the subject filing delay
9 “was made within what California would consider a ‘reasonable time.’” *Evans*, 546
10 U.S. at 198-99. The *Evans* court found “a totally unexplained, hence unjustified”
11 period of at least six months filing delay to be unreasonable under California law. *Id.*
12 at 201. The *Evans* court stated:

13 [s]ix months . . . is far longer than the ‘short period[s] of
14 time,’ 30 to 60 days, that most States provide for filing an
15 appeal to the state supreme court. (citation omitted). It is
16 far longer than the 10-day period California gives a losing
17 party to file a notice of appeal in the California Supreme
18 Court (citation omitted). We have found no authority
19 suggesting, nor found any convincing reason to believe, that
20 California would consider an unjustified or unexplained
21 6-month filing delay ‘reasonable.’ Nor do we see how an
22 unexplained delay of this magnitude could fall within the
23 scope of the federal statutory word ‘pending’ as interpreted
24 in *Saffold*.

25 *Id.* *Evans* also provides the following guidance for determining timeliness:

26 [T]he Circuit must keep in mind that, in *Saffold*, we held
27 that timely filings in California (as elsewhere) fell within the
28 federal tolling provision *on the assumption* that California

1 law in this respect did not differ significantly from the laws
2 of other States, i.e., that California's 'reasonable time'
3 standard would not lead to filing delays substantially longer
4 than those in States with determinate timeliness rules.

5 *Id.* at 199-200 (*citing Saffold*, 536 U.S. at 222-23); *see also* Cal. R. Ct. 28(e)(1)
6 (allowing only 10 days to file a petition for review of a decision by the court of appeal,
7 including habeas corpus decisions).

8 In his OSC Response, Petitioner argues he "is entitled to statutory tolling for his
9 200 day delay." (OSC Resp. 5:22-23, Exs. A, B.) Further, after discussing *Evans*,
10 Petitioner makes an effort to show his 200-day filing delay was justified by explaining
11 he did not have access to the prison law library or legal materials during this period.
12 (*Id.* at 4-5.) Petitioner further supports his position by proffering two exhibits that are
13 copies of two separate "Inmate Request for Interview" forms ("Request Forms"),
14 dated August 27, 2007 ("First Request"), and October 7, 2007 ("Second Request").
15 (*Id.*) The Request Forms indicate the law library may have been closed for most of this
16 200-day period. Specifically, the First Request discloses Petitioner had made multiple
17 requests to have law library access in June and July in order to prepare a federal habeas
18 petition but he never received a prompt response; the First Request also shows
19 Petitioner requested legal materials to be brought to his cell. (OSC Resp. Ex. B.) The
20 First Request also shows that, on November 7, 2007, D. Tartaglia, a library assistant,
21 responded by advising Petitioner the library was closed "due to illness of library staff."
22 (*Id.*) In his Second Request, Petitioner again asked for library access to prepare his
23 federal habeas petition, however, on November 7, 2007, Tartaglia responded by
24 notifying Petitioner the prison law library was closed in September and October "[d]ue
25 to illness of library staff." (OSC Resp. Ex. A.)

26 Based upon the foregoing, the Court finds Petitioner has provided a reasonable
27 explanation for his inability to file his Petition during the foregoing 200-day period.
28 *Evans*, 546 U.S. at 198-99; *see also In re Stankewitz*, 40 Cal. 3d 391, 396-97 n.1

1 (1985) (“Assuming that . . . the delay was substantial,” petitioner met his burden of
2 showing circumstances sufficient to justify the delay.) Accordingly, the Court finds
3 statutory tolling is warranted for the 200-day period running from June 13, 2007, to
4 December 30, 2007. Further, Petitioner is entitled to statutory tolling from December
5 30, 2007, to January 14, 2008, the 15-day period during which his second state habeas
6 petition was pending with the state court of appeal. 28 U.S.C. § 2244(d)(2); *Bonner*,
7 425 F.3d at 1148. The 215 days of statutory tolling for the period running from June
8 13, 2007, through January 14, 2008, extended the limitation periods from June 19,
9 2007, until Monday, January 21, 2008 (the 215th day actually falls on Sunday, January
10 20, 2008).

11 However, even with the benefit of the 215 days of additional statutory tolling,
12 the Petition is still untimely. This is because Petitioner waited until April 9, 2008 --
13 another 86 days after the second state habeas petition was denied on January 14, 2008
14 -- to constructively file his third state habeas petition with the California Supreme
15 Court. (Pet. 4, Attachments.) Neither the Petition nor the OSC Response show or
16 explain why Petitioner was unable to file his Petition during this period. Consequently,
17 the Court finds this unexplained, unjustified 86-day filing delay is unreasonable under
18 California law because it is also clearly “longer than the ‘short period[s] of time,’ 30
19 to 60 days, that most States provide for filing an appeal to the state supreme court,” and
20 “far longer than the 10-day period California gives a losing party to file a notice of
21 appeal in the California Supreme Court.” *See Evans*, 546 U.S. at 199-200; *Forrister*
22 *v. Woodford*, No. 1:05-CV-00170 LJO WMW HC, 2007 WL 809991, at *2-3 (E.D.
23 Cal. Mar. 15, 2007) (88-day delay unreasonable).

24 Thus, Petitioner is not entitled to statutory tolling for his third state habeas
25 petition in the California Supreme Court because the petition was filed after the
26 extended statute of the limitations period expired on January 21, 2008, and has no
27 tolling consequence. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)
28 (“[S]ection 2254 does not permit the reinitiation of the limitations period that has

ended before the state petition was filed”); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (stating that filing of state petition after AEDPA’s one-year time period has elapsed bars federal habeas review); *Webster v. Moore*, 199 F.3d 1259 (11th Cir. 2000) (“A state-court petition [] that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled”).

Accordingly, the Petition and relevant state court records establish it is untimely by 157 days (the amount of untolled time between the new limitation deadline (01/21/08) and the Petition’s constructive filing date (06/26/08)).^{2/}

D. Alternative Start of the Statute of Limitations

1. State-Created Impediment

In rare instances, AEDPA provides that its one-year limitation period shall run from “the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B). Asserting that the statute of limitations was delayed by a state-created impediment requires a showing of a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir. 2002). The face of the Petition and attachments do not set forth any facts showing that Petitioner is entitled to relief under this provision.

2. Newly Recognized Constitutional Right

AEDPA provides that, if a claim is based upon a constitutional right that is

^{2/} The Court further notes that if the Petition was not time-barred it would be subject to dismissal as a mixed petition because three of the four grounds are unexhausted. *See Rose v. Lundy*, 455 U.S. 509, 522, 102 S. Ct. 1198 (1982); *Pliler v. Ford*, 542 U.S. 225, 227, 124 S. Ct. 2441 (2004). Specifically, the Petition and relevant state court records attached as exhibits indicate the first, second, and third grounds of the Petition are unexhausted because they were not raised on direct review, and that Petitioner has raised them in a habeas petition that he recently filed with the California Supreme Court. However, as the above analysis makes clear, all of Petitioner’s state habeas petitions were filed far too long after the statute of limitations expired to have any bearing on the exhaustion issue.

1 newly recognized and applied retroactively to habeas cases by the United States
2 Supreme Court, the one-year limitation period begins to run on the date which the new
3 right was initially recognized by the United States Supreme Court. 28 U.S.C. §
4 2244(d)(1)(C). The face of the Petition and attachments do not set forth any facts
5 showing that Petitioner is entitled to relief under this provision.

6 **3. Discovery of Factual Predicate**

7 AEDPA also provides that, in certain cases, its one-year limitation period shall
8 run from “the date on which the factual predicate of the claim or claims presented
9 could have been discovered through the exercise of due diligence.” 28 U.S.C. §
10 2244(d)(1)(D). The face of the Petition and attachments do not set forth any facts
11 showing that Petitioner is entitled to relief under this provision.

12 **E. Equitable Tolling**

13 As a prefatory matter, the Court observes there is no clearly established federal
14 law that expressly holds equitable tolling is available under § 2244(d)(1), and the
15 Supreme Court has recently acknowledged this point. *Lawrence v. Florida*, 549 U.S.
16 ---, 127 S. Ct. 1079, 1085 (2007) (“We have not decided whether § 2244(d) allows for
17 equitable tolling. [] Because the parties agree that equitable tolling is available, we
18 assume without deciding that it is.”).

19 “Generally, a litigant seeking equitable tolling bears the burden of establishing
20 two elements: (1) that he has been pursuing his rights diligently, and (2) that some
21 extraordinary circumstance stood in his way.” *Pace v. Diguglielmo*, 544 U.S. 408,
22 418, 125 S. Ct. 1807 (2005). A petitioner bears the burden of alleging facts that would
23 give rise to tolling. *Id.*; *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002). The
24 Ninth Circuit has emphasized that determinations of “whether there are grounds for
25 equitable tolling are highly fact-dependent.” *Whalem/Hunt v. Early*, 233 F.3d 1146,
26 1148 (9th Cir. 2000) (en banc). “[E]quitable tolling is justified in few cases,” and “the
27 threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the
28 exceptions swallow the rule.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).

1 In his OSC Response, Petitioner does not claim or show that he is entitled to
2 equitable tolling. However, even assuming, without finding, his explanation for
3 statutory tolling were also raised in support of equitable tolling, the explanation would
4 not entitle Petitioner to equitable tolling for the same or similar reasons. (*See* Section
5 II.C.) Further, the Court notes that restrictions to library access and legal material do
6 not generally qualify as an “extraordinary circumstance” sufficient to equitably toll the
7 statute of limitations for federal habeas petitions. *See Miller v. Marr*, 141 F.3d 976,
8 978 (10th Cir. 1998) (petitioner’s alleged lack of access to law library materials and
9 resulting unawareness of the limitation period until it was too late did not warrant
10 equitable tolling); *Wilders v. Runnels*, No. C031478 CRB (PR), 2003 WL 22434102,
11 *3 (N.D. Cal. 2003); *Atkins v. Harris*, No. C 98-3188 MJJ (PR), 1999 WL 13719, *2
12 (N.D. Cal. 1999).

13 Prison officials typically provide prison law libraries or legal assistants to ensure
14 that prisoners “have a reasonably adequate opportunity to file nonfrivolous legal claims
15 challenging their convictions or conditions of confinement.” *Lewis v. Casey*, 518 U.S.
16 343, 356, 116 S.Ct. 2174 (1996). However, prison officials of necessity must regulate
17 the time, manner and place in which library facilities and legal assistant programs are
18 used. *See Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 858 (9th Cir. 1985).
19 Not surprisingly, lockdowns, placement in administrative segregation/solitary
20 confinement, and other common restrictions on access to the law library and legal
21 assistant programs, generally do not qualify as “extraordinary circumstances” for
22 purposes of equitable tolling. *Lindo v. Lefever*, 193 F. Supp. 2d 659, 663 (E.D.N.Y.
23 2002). There is no due process violation so long as an inmate has the basic capability
24 of presenting his claims to the courts, irrespective of the “capability of turning pages
25 in a law library.” *Lewis*, 518 U.S. at 356-57.

26 Moreover, even if Petitioner was denied access to the law library at various
27 times and for various reasons during the relevant period, he has failed to meet his
28 burden of establishing the alleged limited access made timely filing *impossible*.

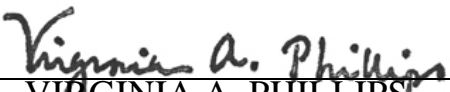
1 *Brambles v. Duncan*, 412 F.3d 1066, 1069 (9th Cir. 2005). Indeed, as discussed above,
2 Petitioner has completely failed to show or explain his failure to file his Petition after
3 the aforementioned 215-day period from May 17, 2007, to January 14, 2008.

4 Accordingly, the Petition, attached exhibits and state court records establish that,
5 despite receiving some statutory and equitable tolling, the Petition is still subject to
6 summary dismissal because it is untimely.

7
8 **ORDER**

9 The Court finds the Petition must be dismissed because it is time-barred for the
10 reasons stated above and in the Court's OSC. Further, by way of the OSC, the Court
11 finds Petitioner has already received notice and an opportunity to show cause why the
12 Petition should not be dismissed as time-barred. ACCORDINGLY, IT IS HEREBY
13 ORDERED THAT the reference to the Magistrate Judge is vacated and the Petition is
14 dismissed with prejudice. The Clerk is directed to enter judgment dismissing the
15 action with prejudice. Any and all pending motions are terminated.

16
17 DATED: _September 19, 2008



VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

18
19 Presented by:

20
21 /s/ ARTHUR NAKAZATO
22 Arthur Nakazato
United States Magistrate Judge